Filed 10/31/12 Soto v. County of San Joaquin CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

REGINALD SOTO et al., Plaintiffs and Appellants, v. COUNTY OF SAN JOAQUIN, Defendant and Respondent.	C066793 (Super. Ct. No. 39-2009-00228668-CU-PO-STK)

Spouses Reginald and Cindy Soto filed this action against defendant County of San Joaquin (County), seeking damages for personal injuries to Reginald Soto that occurred when he fell while dumping trash at a County-owned waste facility.[1] Soto contended the lack of adequate "fall protections" at the facility created a dangerous condition of public property. Defendant County successfully moved for summary

[1] As Cindy Soto's claim is entirely derivative, references to "Soto" are to Reginald unless otherwise indicated.

judgment. The trial court denied a postjudgment motion for a new trial. The Sotos filed a timely appeal following the latter order in November 2010.[2]

On appeal, Soto contends the trial court abused its discretion in excluding evidence he submitted related to the issues of dangerous condition and design immunity; there are triable issues of material fact as to whether a dangerous condition is present on the property; the evidence is insufficient to support a finding that the design of the waste facility was reasonable (and therefore the defense of design immunity is unavailable); and there are triable issues of material fact as to whether the County made changes to the approved design (and thus "lost" the defense of design immunity). He does not raise any issues in connection with the motion for new trial.

As we find it undisputed that a dangerous condition was not present at the waste facility, we do not need to address issues with respect to design immunity. The evidentiary rulings that are material were correct. We shall thus affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Standard of Review

Under the "historic paradigm" for our de novo review of a motion for summary judgment, we first identify the material issues as framed in the pleadings. (*Rio Linda Unified School Dist. v. Superior Court* (1997) 52 Cal.App.4th 732, 734-735.) We then determine whether defendant's evidence entitles it prima facie to judgment in its behalf on these issues. Finally, we consider whether plaintiffs' evidence creates a factual conflict with respect to any of these issues that only a trier of fact can resolve. (*Ibid*.) In the present case, however, we can omit the latter two steps, because there are determinative material facts that are not disputed.

---

[2] Record preparation and briefing were not complete until May 2012.

Pleadings

The record includes an amended complaint filed in March 2010. Its operative allegations are few.

At the County-owned waste facility, an unloading deck abutted an open pit "in an open and unguarded position and without appropriate fall protections" other than "drooping ropes," and did not provide ample spacing between parked vehicles and the pit for users to unload their debris safely. This created a risk of injury of the type that plaintiff Soto experienced when he was in the process of unloading debris from his vehicle. (The pleading otherwise does not provide any details about the injury.) Soto asserted theories of liability for a dangerous condition of public property, the negligent failure of County employees to remedy the dangerous condition or to warn facility users of the condition, the negligent design of the facility, negligence per se for violations of building codes, and Cindy Soto's claim of a loss of consortium. (A fraud count was "dismissed per stipulation" before the motion for summary judgment.)

Causes of action for negligence require a plaintiff to establish a duty on the part of a defendant (in addition to a defendant's breach of that duty that was both the actual and proximate cause of the plaintiff's damages). (*Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1160.) A public entity's duty as a landowner to third parties is more circumscribed than that of a private landowner, limited to Government Code section 835's[3] elements for an action premised on the dangerous condition of public property as defined in section 830. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1132 (*Zelig*).) Even if there is a breach of a statutory duty, liability is subject to any statutory immunities (§ 815, subd. (b)), which generally have preemptive effect, and a plaintiff must plead facts that affirmatively negate potential immunities. (1 Coates et al., Cal. Government Tort

---

3 Undesignated statutory references are to the Government Code.

Liability Practice (Cont.Ed.Bar 2011) Overview, § 1.13, p. 9 (rev. 2/10) (Coates treatise); *Gates v. Superior Court* (1995) 32 Cal.App.4th 481, 494, 510.) Thus, the elements that establish the existence of the statutory duty to third parties for a dangerous condition of public property (the sole theory of liability that Soto pursues on appeal) or any immunity that might apply are accordingly material issues framed within the pleadings. We will focus only on the former.

Evidence

The County has owned and operated a waste facility in Manteca since at least 1985. Reconfigured in July 1995, the waste facility had a "self-haul" area in which users backed their vehicles into parking spaces abutting a concrete unloading area that was elevated about eight inches above the ground. This concrete deck originally was eight feet in width. The County widened it to 10 feet in December 2007. On the other side of the deck, there is an "open, visible, and obvious" drop-off of 52 inches to the "tipping" area floor. As designed, the side with the drop-off to the tipping area does not include a guardrail. Users unload their debris onto the deck, then push it over the edge into the tipping area.

A few months after opening, the waste facility added ropes across the drop-off edge of the deck to help prevent users who lost their balance from falling over the edge. As initially placed, the ropes went across the deck side of several two-foot-wide pillars that run along the drop-off, but at the time of the accident they were strung on the pit side of the pillars, right at the drop-off edge. The ropes are about four feet above the deck, and hang slackly (having about 20 inches of outward play at their centers). During operating hours, the lighting is adequate, and there are signs both warning of the existence of the drop-off edge and cautioning users to dump at their own risk.

The accident occurred in July 2009. Soto had been using the waste facility for 12 years, bringing his trash every two weeks and dumping it into the tipping area. He was

well aware of the drop-off. At the time of the accident, he was 64 years old; he was just under six feet tall and weighed 260 pounds. He had never given any conscious consideration to whether the proximity of the drop-off posed any risk of falling into the pit.[4] He had never previously fallen or come close to falling when using the facility. There was a six-foot separation between the end of his opened tailgate and the drop-off. Immediately before the accident, he was tugging on a metal bench in the bed of his truck with his back to the drop-off. One leg of the bench was caught on carpeting in the truck bed. As he pulled, the leg broke off and Soto fell backward head over heels into the pit (as it appears from a surveillance video). (This type of accident, denominated "stick-and-release," was common to 90 percent of the accidental falls at the facility.) We do not find these details anywhere in the statement of undisputed facts (nor do the parties direct us to the supporting evidence), but the trial court's ruling noted that Soto landed on his head and broke his neck, which rendered him paralyzed from the chest down.

Ruling

The trial court concluded that on these facts Soto had failed to show a substantial risk of injury from foreseeable use *with due care* of the waste facility, in the terms of section 830, subdivision (a). The drop-off was a patent hazard about which there were posted warnings and with which Soto was familiar. There were fewer than 100 falls in over a million user visits,[5] almost all of which were of the stick-and-release variety that

---

[4] Soto noted in a declaration in opposition that he assumed the rope was there to protect people from falling off, but he did not state that he relied on it for that purpose when pulling items out of his vehicle.

[5] There are various totals for the number of incidents and user visits in the record, but the variation does not result in a comparative magnitude between the two that differs materially. (We note Soto's claim that the trial court sustained an objection to the evidence of user visits is based on a *different* paragraph of the same declaration that repeats the user information as well.)

cannot be considered a use of the property with due care. It further found that various immunities came into play.

DISCUSSION

Litigation of this case has resulted in a well-indexed record of more than 2,000 pages and lengthy erudite briefs encompassing the entire menu of issues implicated in the ruling of the trial court.[6] But as we have already intimated, pulling a threshold thread unravels the viability of Soto's action at the outset: Soto failed to establish a triable issue of material fact that there is a substantial risk of injury when the facility is used in a reasonably foreseeable manner *with due care*. (§ 830, subd. (a).) We may thus resolve this question of fact as a matter of law (*Zelig*, *supra*, 27 Cal.4th at p. 1133), and conclude a dangerous condition is not present.

I. Dangerous Condition: Element of Use With Due Care

It is a black-letter legal principle that "to meet the definitional requirements of [section 830], the public property must create a substantial risk of injury when 'used with due care' by the public generally." (2 Coates treatise, *supra*, Dangerous Condition of Public Property, § 12.26, p. 897.) This *definitional criterion* is distinct from the affirmative defense of a *particular* plaintiff's comparative negligence (*id*. at p. 896; *Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 131 (*Fredette*).) We thus disregard Soto's characterization of the County's arguments as invoking the latter rather than the former.

This "due care" element of dangerous condition reflects a legislative policy judgment, greatly narrowing the liability of public landowners as compared with private

---

[6] A notable exception, however, is Soto's inclusion of asides impugning the abilities and character of the trial court. Counsel would do well to omit such advocacy in future.

landowners under the general tort law principles that stem from Civil Code section 1714. (*Zelig, supra,* 27 Cal.4th at p. 1132.)

A *private* owner of land may not have any duty to *warn* about patent hazards, but still can be found to owe a duty to remedy the hazard (under the congeries of factors in *Rowland v. Christian* (1968) 69 Cal.2d 108) to third parties who had reasonable necessity to encounter the hazard. (*Martinez v. Chippewa Enterprises, Inc.* (2004) 121 Cal.App.4th 1179, 1185-1186 [wet sidewalk that was principal if not exclusive means of access to tenant federal agency; trial court thus erred in focusing only on patent nature of hazard]; *Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 121-122 [error to instruct that patent hazard precludes liability, of itself, without consideration of other factors]; *Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20, 25, 33-34 [under modern tort law, no longer the rule that patent hazard precludes landowner liability, thus error to grant nonsuit on this basis alone].)

On the other hand, even though it is reasonably foreseeable that there will be unintended uses or negligent users of public property (2 Coates treatise, *supra*, Dangerous Condition of Public Property, § 12.30, p. 902), a *public* owner of land does not have any duty to safeguard against injury except where there is a substantial risk of injury *even* to persons in general *who exercise due care* in encountering the hazard. (*Biscotti v. Yuba City Unified School Dist.* (2007) 158 Cal.App.4th 554, 558-561 (*Biscotti*) [child used bicycle as stepladder while climbing over fence]; *Schonfeldt v. State of California* (1998) 61 Cal.App.4th 1462, 1466-1467 [teen chose to run across a highway]; *Mathews v. City of Cerritos* (1992) 2 Cal.App.4th 1380, 1384-1385 [to defeat summary judgment, must be triable issue that condition creates hazard for persons who foreseeably would use property with due care, which does not include child choosing to bicycle down steep hill covered with wet grass]; *Fredette, supra,* 187 Cal.App.3d at pp. 132-133 [liability limited to users unable to appreciate danger *even if* using property

with due care; *any* property can be dangerous from sufficiently unsafe use]; *Murrell v. State of California ex. rel. Dept. Pub. Wks.* (1975) 47 Cal.App.3d 264, 271, fn. 7 [in dictum, comparing general tort liability and public landowner liability, noting almost limitless liability otherwise would result for foreseeable negligent use of public roadways].)

Soto cites the above *private* landowner cases toward the end of arguing that the County had a duty to prevent stick-and-release injuries, without acknowledging that they are inapposite because of the significant distinction in doctrines. When there is an obvious danger, members of the general public are not entitled to "ignore the notice which the condition itself provides." (*Fredette, supra*, 187 Cal.App.3d at p. 132; accord, *Biscotti*, *supra*, 158 Cal.App.4th at p. 560 ["premises liability may not be imposed on a public entity when the danger of its property is readily apparent" as a matter of law even if child or minor involved].) Thus, the prevalence of stick-and-release falls does not of itself impart any duty on the County to prevent them.

Soto asserts (without identifying any admissible evidence in his opposition to the statement of undisputed facts) that the public generally would *not* be aware of the risk of "stick-and-release" accidents, and the stringing of the ropes across the drop-off gave rise to the creation of a false sense of security from such accidents.[7] Absent *evidence* of some sort that those who unload debris in a manner giving rise to "stick-and-release" accidents are acting with due care rather than simply ignoring a patent risk (similar to those who cut toward themselves with a sharp knife while holding fruit), or the mere presence of the ropes *reasonably* could cause the public in general to disregard the risk of falling

[7] The trial court sustained objections to conclusions to this effect in the declaration of Soto's expert and a County safety report. We address the propriety of this ruling *post*.

backward, the drop-off is not within section 830's definition of dangerous condition and the County does not have any duty to safeguard such negligent users of the waste facility.

Since the element of due care is absent, it is immaterial that (as Soto argues) there are triable issues of fact whether there is a substantial risk of injury based on the raw number of accidents, or the County's expressed concerns about the accident rate, or expert opinion about the degree of risk presented, or the purported violation of safety standards with respect to the need for handrails. In the absence of the element of dangerous condition, it is also immaterial that there may be triable issues of fact regarding the other elements of section 835 such as proximate cause, foreseeability of the injury, and whether the County created the condition or had notice of it. (2 Coates treatise, *supra*, Dangerous Condition of Public Property, § 12.5, p. 864.) Absent any evidentiary basis for finding a duty to Soto, we decline to jump "over the duty horse into the immunity cart" (*Hefner v. County of Sacramento* (1988) 197 Cal.App.3d 1007, 1013, disapproved on issue of right to jury trial on elements of immunity in *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 73-74 & fn. 3) and do not reach any of the arguments raised in connection with the County's possible immunity from liability.

II. Exclusion of Evidence Relating to Use With Due Care

Soto also contends the trial court erred in excluding five categories of evidence that raised a triable issue of fact on the question of dangerous condition. Beyond the two we noted above, we do not need to address the remainder, because they do not involve material facts relating to lack of due care on the part of those who have stick-and-release accidents.[8] Soto concedes the standard of review of the trial court's rulings is abuse of discretion.

---

[8] These include a purported admission that the concrete deck was not a loading dock and thus was subject to code requirements for a guardrail; the County's concern with the number of accidents at the facility; comparisons with the accident rate at another waste

A. County Report

In a 2004 review conducted to assess the safety of various County facilities, the reviewing committee noted, "With the tailgate down, the work area behind the [vehicle] is [two] feet.[9] The natural tendency for people is to pull debris straight out of the [vehicle] toward the pit. If rubbish breaks free suddenly in the [vehicle], the people unloading the [vehicle] step[] backwards toward the pit. With [two] feet of working room and a five[-]foot vertical drop behind the person, a fall hazard is present." In its recommended solutions, the committee observed that the existing ropes "are worn, lo[o]se and dirty . . . . *It was our impression that they give a false sense of security without providing any real safety.* A person grabbing a rope would have their center of gravity over the edge before the rope becomes taut. The addition of turnbuckle and a daily tightening would let the rope provide the intended safety." (Italics added.) The trial court sustained the County's objection to this evidence as inadmissible opinion evidence from a nonexpert witness, and as irrelevant in any event.

Soto contends the County report was a party admission (or an authorized or adoptive admission of a party). As such, he argues it is not a basis to exclude the report that the material portions are conclusory in nature or represent the opinions of nonexpert witnesses.

We question whether the suggestions and conclusions in an internal report that the County's employees prepared—which did not result in any improvement *in the roping* at the facility, and which the record does not reflect was the subject of any later review on the part of the County—satisfy the criteria for a *party* admission or an authorized or

---

facility that was purportedly similar; and conclusions in *other* actions that the County lost its design immunity because it modified the design.

9 This report predated the December 2007 expansion of the width of the deck by two feet.

adoptive admission, but we do not need to belabor the point. (*Greenspan v. LADT LLC* (2010) 191 Cal.App.4th 486, 524; *Stockton v. Vote* (1926) 76 Cal.App. 369, 397-399; see 1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 105, pp. 808-809, § 119, pp. 825-826.) We do agree an admission is not subject to exclusion on the basis that it represents an opinion. (*Levy-Zentner Co. v. Southern Pac. Transportation Co.* (1977) 74 Cal.App.3d 762, 797; 1 Witkin, *supra*, Hearsay, § 95, pp. 797-798.) However, merely because a statement comes within an exception to the hearsay rule does not prevent its substance from being subject to objection on another basis. (1 Witkin, *supra*, § 8, pp. 686-687.) A trial court properly excludes an otherwise admissible declaration that lacks any evidentiary basis for an opinion contained in it. (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510-511; cf. 3 Witkin, *supra*, Presentation at Trial, § 95, pp. 130-131 [opinion cannot sustain any finding if unsupported with facts].) The 2004 report merely speculates that the ropes give a false sense of security, but does not provide any empiric evidence for imputing this to the general public (as opposed to concluding that the overwhelming number of people who manage to use the facility without injury do *not* have a sense of false security from the ropes). We thus do not find an abuse of discretion in the trial court's ruling.

B. Expert's Conclusions

Soto's expert posited that the hazard from the drop-off might be obvious, "but is not necessarily in the conscious awareness of [people] attending to the foreseeable task of dumping trash from their [vehicle]," because "[p]eople do serial processing; they cannot perform parallel processing" and therefore in unloading, the users "must switch their cognitive activities between their unloading task and their safety awareness monitoring . . . . They cannot continuously stay alert to the falling hazard." He also asserted the presence of the ropes "increased the danger of falling" because they impart a "false security [users have] when they observe" it, since it "suggests . . . that it serves as a safety line" in spite of its ineffectiveness in that respect. The trial court sustained the objection

on the grounds that these opinions were based only on speculation and conjecture without any factual foundation, and were the improper subject of expert testimony.

With respect to these objections, Soto simply cites cases that find opinion evidence admissible. However, he does not discuss the manner in which the opinions *at issue* have any evidentiary support of them.

The expert's proficiency lay in the field of mechanical engineering. He did not suggest he had any expertise in the field of cognitive psychology outside a layperson's knowledge, nor did he give a factual basis for his opinion that the general public is incapable of keeping two things in mind at the same time because humans are "serial" and not "parallel" processors, or for his opinion that the general public would assume ropes at a height of four feet would prevent them from falling backward under them. We thus do not find any abuse of discretion in the trial court's rulings.

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

NICHOLSON, Acting P. J.

DUARTE, J.